

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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LINDA HOWARD, as Trustee of the TIMOTHY  
J. BIRMINGHAM LIVING TRUST,

UNPUBLISHED  
November 8, 2011

Plaintiff/Counter-Defendant-  
Appellant,

v

PENNY BUYCE,

No. 298387  
Calhoun Circuit Court  
LC No. 2010-000559-CH

Defendant/Counter-Plaintiff-  
Appellee.

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Before: M. J. KELLY, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

Plaintiff Linda Howard, as trustee of the Non-Revocable Trust for the Benefit of Timothy J. Birmingham (the Trust), appeals as of right the trial court order dismissing, without prejudice, the complaint seeking to evict defendant Penny Buyce from the home in which she resides with Timothy Birmingham. We affirm the trial court's dismissal of Howard's complaint, but vacate that portion of the order providing that the dismissal is without prejudice.

**I. BASIC FACTS**

Penny Buyce is Birmingham's long-time, live-in romantic partner and the mother of his two children. Birmingham and Buyce have been romantically involved since the mid-1980s and have lived together for over 20 years. Both Birmingham and Buyce are intellectually disabled and receive disability payments from the Social Security Administration. The Trust provides Birmingham with a life estate in the property located at 44 South 24th Street in Battle Creek, which Howard "shall continue to rent" to Birmingham, at a rate "calculated to reasonably cover" the cost of maintenance, property taxes, utilities, and insurance, but not to "exceed a reasonable amount considering [Birmingham's] income," until such time as Birmingham is no longer able to continue residing there, Birmingham chooses to live elsewhere for 90 days or more, or Birmingham dies. Additionally, the Trust provides for the expenditure of Trust assets for the "comfort and well-being" of Birmingham and his children, including but not limited to, "the purchase of food, clothing, household furnishings, payment of costs related to entertainment, non-reimbursed dental and medical expenses, travel/vacations, . . . ." The Trust further provides that, should one of the Trust-ending events listed above occur, Birmingham's children may

continue residing in the home until the youngest child's 26th birthday. Following this occurrence, the trustee "shall deed" the property to Howard and her husband.

Birmingham, Buyce, and their children moved into the 24th Street residence more than 12 years ago, when Birmingham's mother purchased it for the family. However, in October 2009, Howard served Buyce with a Notice to Quit, demanding that Buyce move out of the residence. When Buyce did not do so, Howard filed this action in district court, seeking to have Buyce evicted. Buyce answered the complaint, asserting defenses that raised questions as to title. Buyce also filed a counterclaim asserting constitutional claims and seeking equitable relief.

The district court, on its own motion, transferred the case to the circuit court. Howard then moved for summary disposition. After hearing that motion, the circuit court dismissed Howard's action, concluding that, contrary to Howard's contentions, Buyce was not merely a month-to-month at-will tenant, but rather her residence in the home was derivative of Birmingham's life estate. The trial court concluded that Howard's claim was "not properly pled based upon the ownership interest of the life tenant." Howard now appeals.

## II. SUMMARY DISPOSITION

### A. STANDARD OF REVIEW

The trial court did not specify the subrule of MCR 2.116(C) under which it dismissed Howard's complaint. However, it ordered the dismissal after determining that Howard's claim was not properly pled, thus implicating MCR 2.116(C)(8).<sup>1</sup> MCR 2.116(C)(8) tests the legal sufficiency of the complaint solely on the basis of the pleadings.<sup>2</sup> A trial court should grant dismissal under MCR 2.116(C)(8) if no factual development could possibly justify recovery.<sup>3</sup> This Court reviews de novo a trial court's decision on a motion for summary disposition.<sup>4</sup>

### B. FAILURE TO PLEAD AN ACTIONABLE CLAIM

The owner of a life estate is entitled to possession, control, and enjoyment of the property, and to a right to all beneficial uses of the property, during his lifetime, subject to certain responsibilities to maintain the property and avoid waste.<sup>5</sup> Absent a provision in the

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<sup>1</sup> See *Wengel v Wengel*, 270 Mich App 86, 91; 714 NW2d 371 (2006).

<sup>2</sup> *Id.*, citing *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

<sup>3</sup> *Id.*

<sup>4</sup> *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

<sup>5</sup> *Wengel*, 270 Mich App at 99; *VanAlstine v Swanson*, 164 Mich App 396, 403; 417 NW2d 516 (1987).

conveyance of the life estate specifying otherwise, the owner of a life estate may also convey all or part of his life interest in the property to a third party.<sup>6</sup>

We conclude that the trial court did not err by dismissing Howard's complaint seeking to evict Buyce. The Trust does not restrict Birmingham's right to possession, control, and enjoyment of the property during his lifetime or his right to convey all or a portion of his interest in the property to a third-party, such as Buyce. There is nothing in the Trust that restricts Birmingham's ability to permit Buyce to reside with him in the home for the duration of his life estate. Buyce's presence in the home is permissive, at Birmingham's discretion. In other words, Buyce's occupancy of the home is at Birmingham's invitation, and consequently, is derivative of, and subordinate to, his life estate. Therefore, the trial court properly concluded that Buyce's residence in the home was lawfully derived from Birmingham's life estate and that Howard failed to plead an actionable claim for eviction against Buyce.

We note that the Trust does not permit Birmingham to be evicted. Thus, the only recourse Howard has for any breach of the obligations imposed on Birmingham as holder of the life estate is an action to compel performance of such obligations, or an action for waste, if appropriate.<sup>7</sup>

### C. REMAND RATHER THAN DISMISSAL

Howard argues that, rather than dismissing the entire case, the circuit court should have remanded the matter back to the district court for further proceedings once it opined that it believed Buyce's constitutional claims lacked merit.

On its own motion, the district court transferred the instant action to circuit court "for adjudication of the claims raised by the parties in this matter." The district court's order does not indicate the reason for the transfer nor did either party object to the order. The matter proceeded in circuit court, with Howard's filing of the motion for summary disposition that resulted in the order of dismissal. In that motion, Howard sought summary disposition regarding the entirety of the action, on both the complaint and counter-complaint; she did not merely seek dismissal of Buyce's constitutional claims. The trial court heard and decided Howard's motion accordingly, albeit not in Howard's favor.

Howard now argues that the circuit court should have determined only the viability of Buyce's constitutional claims and, then should have remanded the matter to the district court for further proceedings. Howard points to MCR 4.201(G)(2)(b) to support her claim. MCR 4.201(G)(2) provides that:

(a) A summary proceedings action need not be removed from the court in which it is filed because an equitable defense or counterclaim is interposed.

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<sup>6</sup> *Albro v Allen*, 434 Mich 271, 280; 454 NW2d 85 (1990); Cameron, Estates § 7.8, p 263.

<sup>7</sup> MCL 600.2919(2); *Schuman v Schuman*, 217 Mich 184; 185 NW 717 (1921); Cameron, Estates § 7.8, p 263.

(b) If a money claim or counterclaim exceeding the court’s jurisdiction is introduced, the court, on motion of either party or on its own initiative, shall order removal of that portion of the action to the circuit court, if the money claim or counterclaim is sufficiently shown to exceed the court’s jurisdictional limit.

Howard emphasizes that MCR 4.201(G)(2)(b) only calls for “removal of that portion of the action” exceeding the district court’s authority; it does not require removal of the entire action.

MCR 4.201(G)(2)(b) addresses the district court’s limited ability to award money damages, while permitting the district court to retain jurisdiction of the portion of proceedings not implicating its limited ability to award damages. Howard does not, however, provide any authority for the notion that the district court *cannot* transfer the entire action to the circuit court, nor does the language of the court rule compel such a conclusion. Moreover, MCR 4.201(G)(2)(b) does not address the district court’s authority to hear or to transfer equitable or constitutional claims. Rather, MCR 4.201(G)(2)(a) provides that a district court “need not” remove equitable claims to the circuit court; it does not prevent the district court from doing so. Finally, MCR 4.201(G)(2)(b) is directed to the district court; it is not directed to the circuit court, and it does not address remand of an action from the circuit court to the district court.

Howard acknowledges that the circuit court has concurrent jurisdiction over summary proceedings, including where “equitable defenses raising claims to title, foreclosure, partition or nuisance are involved.” Buyce raised defenses relating to title, as well as equitable and constitutional issues. It was within the district court’s purview to transfer the case to the circuit court.<sup>8</sup> “Circuit courts are courts of general jurisdiction with original jurisdiction over all civil claims and remedies, except when the Michigan Constitution or a statute confers *exclusive* jurisdiction on another court.”<sup>9</sup> Michigan district courts have *exclusive* jurisdiction over civil matters where the amount in controversy is less than \$25,000,<sup>10</sup> district courts have *concurrent* jurisdiction over civil infractions,<sup>11</sup> as well as over summary proceedings to recover possession or premises.<sup>12</sup> Howard provides no authority indicating that the circuit court was required to remand the case back to the district court once it discounted Buyce’s constitutional claims. We conclude that the circuit court was not prevented from considering, and ruling on, the entirety of the motions pending before it.

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<sup>8</sup> MCR 4.201(G).

<sup>9</sup> *Ammex, Inc v Treasury Dep’t*, 272 Mich App 486, 494; 726 NW2d 755 (2006), citing MCL 600.601 and MCL 600.605 (emphasis added).

<sup>10</sup> MCL 600.8301(1).

<sup>11</sup> MCL 600.8301(2).

<sup>12</sup> MCL 600.8302(3); MCL 600.5704.

#### D. DISMISSAL WITH PREJUDICE

This Court has previously ruled that a grant of summary disposition under MCR 2.116(C)(8) is to be with prejudice.<sup>13</sup> Thus, we conclude that the trial court improperly dismissed Howard's complaint *without* prejudice. Accordingly, we vacate that portion of the trial court's order providing that the dismissal is without prejudice and remand for entry of an order specifying that the dismissal is *with* prejudice.

We affirm the trial court's dismissal of Howard's complaint, but vacate that portion of the order providing that the dismissal is without prejudice. We remand to the circuit court for the limited purpose of entry of an order of dismissal with prejudice. We do not retain jurisdiction.

/s/ Michael J. Kelly  
/s/ E. Thomas Fitzgerald  
/s/ William C. Whitbeck

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<sup>13</sup> *ABB Paint Finishing, Inc v Nat'l Union Fire Ins Co*, 223 Mich App 559, 563; 567 NW2d 456 (1997).